No. 14780

In the
United States Court of Appeals
For the Ninth Circuit

WESLEY LAWRENCE UFFELMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Northern District of California, Southern Division. The appellant was sentenced to custody of the Attorney General for a period of one year and one day. [R 12-13]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R 14]

*R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

Appellant was indicted under U.S.C., Title 50, App. Sec. 462 (Universal Military Training and Service Act) for refusing to do civilian work, as ordered. [R 3-4]

Appellant pleaded Not Guilty, [R 5] waived jury trial [R 6-7] and was tried on March 17, 1955. [R 7-] Appellant was convicted by Judge Oliver J. Carter on April 15, 1955, [R 12-13] and sentenced on the same day. [R 12-13]. At the close of the evidence, a Motion for Judgment of Acquittal was made and argued [R 61] and denied [R 12-13]. The motion contains all of the grounds that the appellant relies upon for reversal.

THE FACTS

Appellant registered with Local Board No. 23 and timely filed his eight page Classification Questionnaire on May 2, 1949. [Ex 5-]**

In it he showed he was born on February 11, 1930 and that he was "a student preparing for the ministry under the direction of Jehovah's witnesses." [Ex 7] He did not claim at that time that he was either a regular or an ordained minister. [Ex 7] He did not state what classification he should be given, at the place such an answer was invited [Ex 11] but he did state that he was studying "to better learn and qualify for

**Ex refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

ministry." [Ex 11] He was single and working forty hours a week as a farmer. [Ex 8-9] He asserted that he was a conscientious objector, [Ex 11] was sent the four-page Special Form for Conscientious Objectors on June 27, 1949 which he completed and returned on July 1, 1949 [Ex 13-]; he was not classified until August 16, 1950; on that date was classified in Class IV-E, the then classification for the "complete" conscientious objector registrant. Class IV-E entailed no burden or obligation that would take Uffelman from his then, part-time ministry so he did not appeal. He was thereafter, on Nov. 14, 1951, reclassified by the local board into Class I-A. He had an appearance before his local board and claimed for the first time that he should have the IV-D minister's classification [Ex 168] because he had become a "pioneer" (that is, full-time) minister, [Ex 177]. He presented some documentary, corroborating evidence. [Ex 34-47] The local board kept him in Class I-A so he took an appeal. He received a I-0* from the appeal board. He appealed to the Presidential Appeal Board again detailing why he wanted the IV-D [Ex 82-84] but was put back in Class I-A by that body. He was ordered to report for induction into the armed services, refused to submit to induction, was prosecuted and acquitted. [Ex 12, 97]

After his acquittal the local board classified him in Class I-0. He asked for a personal appearance be-

*Class I-0 had become the new designation for the "complete" conscientious objector in 1951 and required 24 months of civilian work, as ordered by the local board.

fore the local board [Ex 95] and received one on December 8, 1953. [Ex 13] He brought two ministerial co-workers to this hearing, to testify for him but they were refused admission. [R 32-33] His classification was not changed by the local board, or upon appeal. Upon appeal his claim for reclassification was not given the "special appellate procedures." He was subsequently ordered to report for civilian work; he refused, was indicted and convicted.

At no time during appellant's selective service processing did the local board post the names and addresses of Advisors to Registrants.

QUESTIONS PRESENTED AND HOW RAISED

I.

The record shows that the local board never posted the names and addresses of Advisors to Registrants.

The question presented here is whether the failure to post the names and addresses of Advisors to Registrants is a denial of due process.

The question was raised by motion for judgment of acquittal [R 7-11] as were the following questions.

II.

The record shows that when the appellant perfected his administrative appeal he was not given the "special appellate procedure."

The question presented here is whether such procedures are the right of selective service registrants postured as was this appellant.

III.

The record shows that appellant was not permitted to bring witnesses to his hearing before the local board.

The question presented here is whether this was an abuse of discretion and of such gravity that it is a denial of due process.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

I.

Appellant was deprived of the Advisor to Registrants and this is a sufficient denial of a procedural right to constitute a denial of due process.

The trial court found that his local board did not post the names and addresses of Advisors to Registrants on the office bulletin board.

The law requires the posting [§1604.41 of 32 C.F.R.] and this Court has declared that failure to post presents a problem of due process. *Chernekoff vs. United States,* 219 F. 2d 721, 724. Also, it is so serious a departure that an administrative appeal doesn't cure the defect. *Ibid* and *Franks vs. United States,* 9 Cir., 1954, 216 F. 2d 266.

II.

When appellant was deprived of the special appellate procedures the Selective Service System lost jurisdiction to order him to report for civilian work.

The only reasonable interpretation of the Act of Congress is that it was intended that every registrant perfecting an administrative appeal involving a conscientious objection claim should have the special appellate procedures. Otherwise, the registrant denied the conscientious objector classification by the local board would have greater rights and opportunities than the one recognized as a sincere objector by the local board.

This Court has so construed the Act and the regulation in *Sterrett vs. United States,* 9 Cir., 216 F. 2d 659: "In view of what we here hold, not only was the Department of Justice in error in refusing to hold a hearing but so much of the Regulation as would purport to deny such a hearing to these registrants was itself unauthorized by the statute." [665]. Also see *Bates vs. United States,* 75 S. Ct. 529 and *De Moss vs. United States,* 75 S. Ct. 659.

III.

The appearance Before Local Board held on December 8, 1953 was unfair.

A hearing that doesn't give reasonable opportunity to present evidence is unfair. There is no adequate substitute for oral presentation when oral presentation is permitted. The regulation permitted oral presentation. The local board abused its discretion in refusing entrance to the two mature co-ministers who could have authoritatively corroborated appellant's testimony and aided him in the right given him by the regulation, namely, to discuss, argue, and point out the weight of material in his file. The cases dealing with this point support appellant's argument that the board abused its discretion.

ARGUMENT

I.

APPELLANT WAS DEPRIVED OF THE ADVISOR TO REGISTRANTS. THIS WAS A DENIAL OF PROCEDURAL DUE PROCESS.

It is indisputable that appellant's local board did not post the names and addresses of Advisors to Registrants. The Court so found:

> "Cross Examination
>
> "MR. FOSTER: Q. You remember everything that was on that board from the first time you registered?

THE COURT: Now, Mr. Foster, I don't think there is any necessity of going into it. You know there is none posted and there is no use in cross examining the witness on that subject. Both the clerk and Col. Ferrill have testified that there weren't any such, and it is immaterial to me whether he saw it or didn't see it because there wasn't anything there." [R. 45]

Under the law, during all the period of appellant's selective service processing, it was essential to due process that the local board post the names and addresses of Advisors to Registrants.

At all times concerned, 32 C.F.R. §1604.41 read as follows:

"ADVISORS TO REGISTRANTS

1604.41 APPOINTMENT AND DUTIES.—

"Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the Selective Service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

On January 31, 1955 E.O. No. 10594 changed §1604.41 of the Selective Service Regulations by making the appointment of Advisor permissive instead of

mandatory. The change of one word in the regulation "shall" to "may" indicates a prescient anticipation of this Court's February 24, 1955 *Chernekoff** opinion; the briefs were in, oral argument had been heard and the handwriting was on the wall.

A trial court (the later of the only two other decisions on this point that have been reported) has reached the same conclusion as did this Court in *Chernekoff*:

> "At no time does it appear that he was apprised of his right to consult with a Selective Service advisor as provided for in the regulations, nor did he see any notice posted in the premises occupied by the board informing him of such right, nor was any such notice called to his attention. None of this testimony was controverted by the Government."
>
> *United States vs. Giessel,* 129 F. Supp. 223, 225.

But see the earlier one: *Dorn vs. United States,* 121 F. Supp. 171. Dorn had failed to exhaust his administrative remedies, however.

This type of failure on the part of a local board is of such a serious nature that it alone is a denial of due process and no administrative appellate procedure or decision can cure the defect. This Court has so indicated in *Chernekoff, supra,* page 724, citing *Franks vs. United States,* 9 Cir., 1954, 216 F. 2d 266.

Deprivation of such an important procedural opportunity should be considered a jurisdictional matter

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**Chernekoff vs. United States,* 9 Cir., 219 F.2 721, 722, 724.

much as deprivation of notice of classification with its concurrent notices of rights to a personal hearing and to an appeal. It is more than a mere clerical error. Since the scope of review in selective service prosecutions is so limited, procedural due process should be strictly adhered to. In fact, the rule is stated in *N.L.R.B. vs. Cherry Cotton Mills,* 5th Cir., 98 F. 2d 444, 446, as well as in many other cases, that where the scope of review is very narrow and restricted then there is special need for an insistence on strict compliance with the procedural safeguards.

The failure to provide the registrant an essential protection, a protection specifically required by the regulation then in effect, results in a jurisdictional failure.

St. Joseph Stockyards vs. U. S., 298 U. S. 38;
Yamatoga vs. Fisher, 189 U. S. 86;
U. S. vs. Laier, 52 F. Supp. 392;
U. S. vs. Peterson, 53 F. Supp. 760;
U. S. ex rel. Bayly vs. Record, 51 F. Supp. 507, 515.

It is settled that due process within an administrative agency requires that those administering it strictly follow protective regulations.

It is evident from the cross-examination of appellant that the Government believes the mere existence of officials (particularly the full-time clerk) willing and able to help the registrant, is sufficient compliance with the regulation.

The *posting* on the bulletin board is the essential portion of the regulation. It is conceded by appellant that every local board has many officials more or less available for giving advice to registrants; a posting on the bulletin board of such fact, *with their names and addresses* perhaps would meet the requirement of the regulation. Partial compliance is no compliance. There is no evidence that the "availability" of the many selective service functionaries, for free advice with respect to the varied problems of a registrant was conveyed, actually or constructively, to appellant.

> "Q. Did you notice on the desk there the names of the Government appeal agent and of the local board members?
>
> "A. No, I never." [R 45]

Further, certain facts must not be overlooked. Regrettable as it may be the numerous cases before this Court generally show that the relationship between the religious objector and the clerk has become an adversary proceeding. She is overburdened with detail, ever aware of the obligation of her board to meet its quota and is often personally antipathetic to the objector's claim for exemption from military service. He either senses this or soon comes to believe it through his or his friend's experience. Consequently he doesn't consider the clerk or the board members "on his side." Also, he has heard [this appellant actually learned] that lawyers giving specialized service and individual attention cost money. True, he can borrow from his relatives when he faces a felony indictment. But bor-

row for advice? "See the Congregation Servant or write New York", he is told. Realizing all this the promulgators of the regulations provided for Advisors and stipulated that their availability-for-free should be brought to the attention of the registrant *by a posting* of the fact of their existence *plus* their names and addresses.

It must be recalled that under the selective service regulation it is forbidden to allow the defendant to have counsel before the board. [§1624.1(b)] He has no right of counsel and cannot insist on a lawyer being present. See *United States vs. Pitt,* 3rd Cir., 1944, 144 F. 2d 169; *Niznik vs. United States,* 6th Cir., 1949, 173 F. 2d 328. Since the registrant does not have a lawyer when he appears before the local board for his hearing, this of necessity means that he must have advice in the making of a record on which he is later to be tried for a felony. While posting is constructive notice, the failure to give it is no less a violation of procedural due process than is the failure to give actual notice when actual notice is required by the regulations. When actual notice is required, failure to give it has been found fatal. See *United States vs. Fry,* 2d Cir., 1953, 203 F. 2d 638; *United States vs. Stiles,* 3rd Cir., 1948, 169 F. 2d 455.

An unreported decision by Judge Peirson Hall in *United States vs. Kariakin,* No. 23223, S.D. California, January 12, 1954, further supports appellant:

> "MR. TIETZ: Your Honor has heard me on all the material points that I wish to present.

THE COURT: Very well.

I am inclined to think that your point is good in connection with the matter of not being properly advised of his rights. You call it a matter of defective notice.

MR. TIETZ: Yes, sir.

THE COURT: I do not know that it could be so classified as a defective notice because I do not know that they are required by any regulation to give a notice which includes that.

MR. TIETZ: But they do. That is what I was trying to establish.

THE COURT: They do that as a matter of practice and it is not—in other words, I do not think the practice can result in the creation of a right to a person to commit a crime, but I do think that under the regulations and the Selective Service procedure that these men are entitled to have advisors and persons performing the function of advisors and they are entitled to be able to look to them for advice and to be told by them what their rights were. In this case he was entitled as a matter of right to receive the fair summary of the adverse testimony if he requested it, but he was never advised that he had the right to request it, either by the notice and the fact that they do now contain that notice, which I understand you stipulated to is evidence that the Selective Service System recognizes that they are entitled to have that advice and were entitled to have that advice.

For that reason I think that the defendant here was deprived of his right to that advice and that the regulations were not followed in that respect

and he should be and is acquitted, and his bond is exonerated.

MR. TIETZ: Thank you." [underscoring supplied]

It is submitted that the failure to post the names and addresses of Advisors to Registrants, as required by the regulations, requires a reversal of the judgment of conviction.

II.

THE DRAFT BOARD LOST JURISDICTION TO ORDER APPELLANT TO REPORT FOR INDUCTION BECAUSE HE WAS DENIED PROCEDURAL DUE PROCESS OF LAW IN THAT HE WAS ILLEGALLY DEPRIVED OF HIS RIGHT TO AN INVESTIGATION, HEARING, REPORT AND RECOMMENDATION, UPON HIS ADMINISTRATIVE APPEAL CONTRARY TO SECTION 6(J) OF THE ACT.

The record indisputably shows the following two facts:

1. In 1952 when appellant was given an administrative appeal he *was* given the "special appellate procedures" provided in §1626.25 of the Selective Service Regulations. The file shows that in the eight months between his reclassification by the local board and his reclassification by the appeal board, the FBI investigated his current status, a Hearing Officer of the Depart-

ment of Justice interviewed him at length and the Attorney General made a recommendation, based on the foregoing, to the appeal board. [Ex 53, 59, 60-63]

2. In 1953, when appellant was given another administrative appeal (from the December 10, 1953 notice that he was retained in the undesired I-0 classification) he *was not* given the "special appellate procedures" to aid in determining his current status but was promptly reclassified in the same Class I-0 by the appeal board on January 7, 1954 [Ex 12].

It is appellant's position that he should have been given the special appellate procedures on the 1953 appeal; that if he must also show he was prejudiced by the failure to do so he has done this.

The whole policy of the draft law is directed to classification according to status. The law recognizes that status changes: 32 C.F.R. 1625.1 "(a) No classification is permanent." Appellant had filed considerable new material and much had transpired in the year after the first appeal. Appellant was entitled to be judged on a full and up-to-date record. The law requires it.

The "law" on this point includes the Act, the Regulations, and the decisions of this Court.

It is appellant's position that

1. The Act, which has been the same at all times since 1948, supports his contention;

2. The regulation, which has undergone three changes, and which seemingly forbids appellant's contention, must give way to the Act.

This Court's decision in *Sterrett vs. United States*, 9 Cir., 216 F. 2d 659, supports his above contentions and should be followed.

1. The Act is concerned with this type of appeal and, as thoughtfully construed, supports appellant's contention.

Section 6(j) of the Act reads in part:

"Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board,

subject to such regulations as the President may prescribe to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

Section 6(j) shows that Congress is concerned with the protection of the rights it has given the religious objector, giving him also (and him alone) certain special appellate provisions. However, it also *seems* to show (and this misled the Department of Justice) that the special appellate procedures are only for registrants whose claims are not sustained by the local board. It will be necessary to deal with this misconception in this brief.

No reason is disclosed by the file why this appellant was not given the special appellate procedures. In other instances of such deprivation [see *Sterrett vs.*

United States, supra, and *De Moss vs. United States,* 75 S. Ct. 659; also see *Bates vs. United States,* 75 S. Ct. 529 where the Supreme Court went a step further] it was argued by the Government that the special procedures were to be given only where the local board had *not* given the registrant the 1-0 classification. Doubtless, similar reasoning applied here. However, the reason is unimportant; the deprivation is a fact and, as appellant argues, constitutes a denial of the due process granted by the Act.

When appellant was deprived of the special appellate procedures the Selective Service System lost jurisdiction over him. There is a great difference between the scope of review for the purpose of upsetting a determination by a draft board and the scope of review of the determination of some other administrative agencies. The scope of review permitted in draft cases is limited to that allowed in deportation cases. (See the cases cited in footnote 14 of the *Estep* case, 327 U. S. 114, 123, 66 S. Ct. 423 (1946).) Notwithstanding this limitation placed on the judicial review of an administrative determination, the fact remains that procedural due process of law must be strictly adhered to. The rule is stated in *N.L.R.B. vs. Cherry Cotton Mills,* 5th Cir., 1938, 98 F. 2d 444, 446, that where the scope of review is very narrow and restricted, then the need is greated for an insistence on strict compliance with the procedural provisions. This is true even in draft cases. (See *Ver Mehren vs. Sirmyer,* 8th Cir., 1929, 36 F. 2d 876, 881, and *United States vs. Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 92.) These cases hold that

there must be a full and strict compliance with the procedural provisions. There are many other cases involving procedural violations that support this rule.

In the *Sterrett* and *De Moss* cases, *supra,* the registrans were deprived of their local-board-given I-0 classifications by the appeal boards; appellant Uffelman was not but this is not a distinguishable difference. First, no one could foretell that Uffelman would not be given a less desirable classification by the appeal board. Second, his claim *involved* conscientious objection, the same as and as much as Sterrett's and De Moss': None belonged to any of the 124 pacifist-producing sects; each was one of Jehovah's witnesses; each was a conscientious objector to participation in war *for the identical reason:* his irrevocable commitment to his ministry. [Ex 84-85] No other reason was involved. His conscientious objection was inseparable from his ministry claim and was solely based on it; much of the evidence of his ministry activity supported his conscientious objector claim; *all* the evidence on his conscientious objections supported his ministry claim. Therefore, it is unquestionable that his appeal had a conscientious objector claim in it.

Finally, it must not be overlooked that the effect of every appeal is "to place the question of his proper classification in its entirety before the appeal board, and that the regulations required the board to review the case and the registrant's whole record *de novo.*" *Cox vs. Wedemeyer,* 9th Cir., 192 F. 2d 920, 922, quoted approvingly in *Sterrett, supra,* 663. Thus, Uffelman's

claim was before the appeal board with two possibilities other than the I-O continuation that actually resulted: 1) He could have been "demoted" to a so-called higher classification [as were *Sterrett* and *De Moss*]; such demotion has not been infrequent. See this Court's reversals, upon confession of error, in the cases of *Kite vs. United States,* No. 14827; *Warren vs. United States,* No. 14828, *Padgett vs. United States,* No. 14829, *Brown vs. United States,* No. 14830; and 2) He could have been given his desired IV-D classification either because of the evidence already in the file or because of it plus the new evidence and opinions procured by the special appellate procedures. However, the facts normally revealed by an up-to-date FBI investigation and Hearing Officer Hearing, plus the educated opinions of the Hearing Officer and the Attorney General were neved developed and the appeal board and this appellant both were deprived of their benefit.

Appellant was injured. As noted above, *all* classifications were opened by the appeal. This Court, in *Cox, supra,* observed that although Cox was appealing for a IV-D, minister's classification, the question of whether he was a conscientious objector was before the appeal board. It goes without saying that when Uffelman appealed in 1953 for the IV-D classification, this claim also was before the appeal board. He had considerable evidence in his file on this claim but obviously not enough to convince the fact triers. Since his claim of conscientious objection was specifically founded on his ministry, facts concerning his ministry that had a bear-

ing on his conscientious objections were pertinent and relevant to the inquiry. Ordinarily, and with respect to the 124 other types of conscientious objectors, the inquiry concerning their conscientious objections is an end in itself. The fact that here the evidence also applied to a "lower" classification specifically claimed does not render the evidence less relevant to the inquiry.

Part of appellant's argument on congressional intent, especially as this intent has already been interpreted by this Court, will be found in the succeeding paragraphs.

2. By the time of appellant's second processing by the appeal board the pertinent regulation had been amended and the change excluded him from the special appellate provisions; this amended regulation is contrary to the intent of Congress.

The regulation putting into effect the portion of Section 6(j) of the Act with which we are concerned has always been §1626.25 of 32 C.F.R. It was amended twice since 1948, the Selective Service System reprintings of the regulation being dated 3 July 1952 and 5 January 1953. The 1952 amendment provided expressly that the special appellate provisions should be given only where "the local board has classified the registrant in any class other than I-O." The 1953 amendment by-passed the appeal board's consideration of the same file used by the local board and provided that the file should first be augmented by the

special appellate provisions; the augmented file was then used by the appeal board.

We are therefore concerned with whether this exclusionary amendment is valid; or whether it was required of the Selective Service System and the Department of Justice that this appellant be given the special appellate provisions in December 1953 when he perfected his appeal but was "short-circuited."

Congress knew that the local boards would not have the final say in all cases. It knew that appeals would be taken. In fact the act provides for appeals generally.

Section 10(b) of the act provides for the boards. Section 10(b) (3) in particular mentions the local boards and appeal boards. Section 6(j) deals specifically with conscientious objectors, including procedure on appeal. The sentence in that section of the act, reading "Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board" is mere surplusage. It is submitted that this is the holding of *Sterrett, supra.* "In view of what we here hold not only was the Department of Justice in error in refusing to hold a hearing but so much of the Regulation as would purport to deny such a hearing to these registrants was itself unauthorized by the statute." [665] The registrant would have the right to take an appeal in any event under the act. It merely recognizes that he has the right to take an appeal like

all other registrants. The conscientious objector is not limited in taking an appeal claiming other grounds. This provision of the act was merely to ensure that the conscientious objector had the right to appeal from the denial of the claim.

The controlling sentence is one following the one above quoted, namely, "Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing." The words "such appeal" cannot be reasonably interpreted to mean only in event he appeals from a denial of the conscientious objector claim. The Government so argued in the *Sterrett* case and its argument was rejected. The sentence says that upon the filing of the appeal the appeal board shall refer any such claim to the Department of Justice. If Congress intended to limit "such claim" it would have said so. The proper interpretation of this sentence is that whenever *any* appeal taken to the appeal board *involves* the conscientious objector claim, "such claim" must be referred to the Department of Justice for inquiry and hearing.

Congress also knew that there would be a *de novo* consideration of the case by the appeal board. Especially is this true of the Congress that passed the 1948 act since the regulations provide for the *de novo* consideration of the case upon appeal by the appeal board. An appeal board therefore performs the same function as the local board. It is required to consider the case as though the registrant had theretofore never been classified. Section 1626.26 provides that "The appeal

board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant."

Since Congress knew that the conscientious objector status should be considered *de novo* by the appeal board, this would mean that the conscientious objector I-O classification would no longer be in effect: It certainly would not be a binding judgment like a judgment of a court of law. The taking of the appeal from any local board classification for all practical purposes constituted an obliteration of that classification regardless of what the classification may have been. This would put the registrant in the same position before the appeal board as before the local board before any classification. Now with the registrant standing in this unclothed position before the appeal board and with the appeal board having doubt or intending to deny the conscientious objector classification, it woud be plain that Congress intended that there would be an investigation and hearing in the Department of Justice.

The only way that this conclusion can be escaped is to have something specific in the act which would command that there be no investigation in such circumstance.

It is necessary to consider the reasonableness of this interpretion and the unreasonableness of the construction placed upon the act by the government. It would put Congress in an incongruous position. It would mean that the appeal board would have greater author-

ity than the local board, thus making the law inconsistent. The appeal board has no greater authority than the local board so far as classification is concerned. Congress was after the facts on claims. The only way the facts could be obtained was to refer the matter to the Department of Justice. The very purpose of the Department of Justice investigation was solely to protect the government against malingerers and to ensure the bona fide conscientious objector against arbitrary and capricious denials. If the local boards were not permitted by Congress to exercise arbitrary and capricious power, then certainly the boards of appeal were not intended by Congress to have such power. If the denial of the conscientious objector claim by the local board demanded a Department of Justice inquiry and hearing, then certainly the possibility of the same denial by the appeal board commanded a similar inquiry and hearing.

It should be remembered that the investigation and hearing in the Department of Justice is not only for the benefit of the government. It also is for the benefit of the registrant. The appeal board is entitled to know all the facts. A registrant is entitled to have the claim developed in the Department of Justice if it is not to be granted by the draft boards—either local or appeal.

It is unreasonable to say that Congress intended to make the safety and welfare of the conscientious objector before the appeal board dependent upon whether the claim was granted. The registrant would be much better off if the local board denied the claim in each

case. Then this would mean that he was assured of an investigation. Since the appeal board has no greater authority than the local board, the logical consequence is that the hearing in the Department of Justice must be had.

This seems to be the only reasonable interpretation that can be placed on the act. The act must be interpreted in a fair and just way. Congress intended that there should be a fair and just selection of registrants. It would not be fair and just to give a man denied the conscientious objector classification by the local board greater rights than one given the conscientious objector status by the local board. Congress did not intend to discriminate between two classes of registrants when they appear before the appeal board. Congress certainly intended to give the conscientious objector found by the local board to be entitled to the classification at least the same rights before the appeal board as the one denied such status by the local board.

Finally, the sentence of the act immediately preceding the sentence providing for the inquiry and hearing is merely declaratory of the rights of the registrant to an appeal. It merely iterates for the conscientious objector the right of appeal that is granted all registrants under the act. If the sentence is interpreted in this way, the sentence that follows about inquiry and hearing means that there should be an investigation and hearing following the filing of such appeal. "Such appeal" means an appeal by a conscientious objector or by a person having "such claim" as a

conscientious objector. The word "appeal" used in the sentence is not in any way qualified by reference to the type of classification that was made by the local board. Since the right to the investigation flows from the taking of the appeal, rather than the type of classification made by the local board, it is absolutely mandatory that the inquiry and hearing be conducted by the Department of Justice in every case where there is an appeal to the appeal board and where a claim for classification as a conscientious objector is involved in such appeal, regardless of the appeal board classification.

The usual conscientious objector registrant wants the I-O or I-A-O classification; the Jehovah witness conscientious objector wants the IV-D classification. The latter registrant must, of course, show additional facts, namely, that his vocation is the ministry, whereas the former need only satisfy the Selective Service System concerning his religious training and belief.

Yet, both types of conscientious objectors are just that. A few years ago the pacifist type objector who desired the I-O classification had a great problem in trying to convince the Selective Service System that he shoudn't be satisfied with the I-A-O classification; the same attitude of mind confronts the Jehovah's witness objector today. The same unwillingness among draft officials to try to comprehend his position is besetting him. This, doubtless, is the root of the interpretation of the law that has deprived the appellant of the special appellate procedures. Once it is recog-

nized why he is a conscientious objector, his right to these procedures would be recognized.

The application of these procedures to him would result in a compliance with the intent of Congress and be beneficial to all concerned for the application of all available facts to the solution of a problem is always beneficial. Since they were not given to him the judgment should be reversed.

III.

THE APPEARANCE BEFORE LOCAL BOARD WAS UNFAIR

On December 8, 1953 appellant had a personal appearance before local board. [Ex 13] At this hearing he had his last opportunity to favorably influence the local board with respect to his claim for a minister's classification. It is undisputed that he brought two ministerial coworkers to witness for him. The record, pages 32-33, 48, shows that they were mature men, friends and coworkers for many years, long experienced in the work of his sect and responsible officials in it. It is also undisputed that they weren't allowed in.

It is appellant's position that there is no adequate substitute for oral presentation and argument when they are matters of right. It is unquestionable that the regulation gives the registrant, appearing before his local board the right to discuss, point out, etc., etc. §1624.2(b) so provides. To deprive him of such a right is acknowledged to be a denial of due process. See

Davis vs. United States, 6th Cir., 199 F. 2 689. Appellant believes this principle extends to the use of oral testimony and to the aid such witnesses may give him in discussion and that it is an abuse of discretion for a local board to forbid him the use of witnesses under circumstances such as those of December 8, 1953. At least two courts have so held.

In *United States vs. Glessing,* D. of Minn. No. 8173, Judge Joyce, in acquitting the defendant said:

> "Why this Board didn't hear these three witnesses that the young man brought in I don't know. I don't know whether their story would have been an elaboration of what he had already told the Board or if it was supporting testimony which might have gone into greater detail than he had presented which might have disclosed facts which if the Board knew them might have caused them to change his classification. It doesn't seem to me that it is quite the American way to slap down a man and say we won't hear you at all about this thing. He was there; he was earnest; he was trying to get their story to the Board. What the story was I don't know. He doesn't know now because he wasn't permitted to use them and the Board doesn't know or didn't know because the Board wouldn't proceed to hear them."

In *United States vs. Kobil,* E. D. of Mich., No. 32390 Judge Picard, in acquitting the defendant said:

> "But that is sort of a temporary classification. He has got ten days in which to say, 'Well, I want

to be heard.' He said he wanted to be heard. He came down there with two witnesses. They wouldn't let his witnesses in.

"That was wrong, unless it appeared that his witnesses were creating some kind of a disturbance or were there for the purpose of preaching Jehovah Witness doctrines. But they might have been there to show that he was on the corner and sold tracts, or that he went from door to door, and they might have been there for the purpose of showing that he was a conscientious objector and yet the board never heard them. That is wrong; absolutely wrong and unAmerican. The boards might as well find it out now as at any time.

"Now, the fact that this man won't salute the flag makes my blood boil; and that he won't fight for his country also makes my blood boil. But that hasn't anything to do with this, with you and me. I am the Judge; I have got to follow the law as it is in making a decision—not my natural tendencies, because he probably woud have been in jail long ago if I had been permitted to follow my natural tendencies. That isn't it.

"I want to look at this from the angle that I believe I should as a Judge."

There are many features of the Jehovah's witnesses' work and terminology that are not well understood by outsiders. The explanations submitted by registrants are often rejected solely because of their youth. The same explanation, discussion, argument, "pointing out", etc., from an official of the sect, a man of the same generation as the board members, obviously has a

better opportunity to secure a respectful hearing and to be persuasive.

Appellant was arbitrarily deprived of this opportunity at the Appearance Before Local Board.

CONCLUSION

Appellant has been denied due process of law and the judgment of conviction should be reversed.

Respectfully submitted,

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